MOTION FILED
JUN 24 2003

No. 02-1624

In the

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND PACIFIC RESEARCH INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation and Pacific Research Institute respectfully move this Court for leave to file the attached brief amicus curiae in support of the petition for writ of certiorari.[1] Counsel for the United States of America and Elk Grove Unified School District have consented to the filing of this brief and their consents have been lodged with the Clerk of the Court. Counsel for Respondent Michael A. Newdow, however, withheld consent.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, tax-exempt public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Coral Gables, Florida; Honolulu, Hawaii; and a liaison office in Anchorage, Alaska. PLF attorneys actively engage in research and litigate over a broad spectrum of public interest issues nationwide. PLF submits this brief because it believes its public policy perspective and litigation experience involving the Establishment Clause of the First Amendment to the United States Constitution will provide a valuable viewpoint. For example, PLF attorneys have participated in Establishment Clause cases before the United States Supreme

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Court, including *Simmons-Harris v. Zelman*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

Pacific Research Institute (Institute) promotes individual freedom and personal responsibility. The Institute believes these principles are best encouraged through policies that emphasize free economy, private initiative, and limited government. Since its founding in 1979, the Institute has remained steadfast to the vision of a free and civil society where individuals can achieve their full potential. By focusing on public policy issues including education, the environment, health care, entrepreneurship, and regulation, the Institute fosters a better understanding of a free society among leaders in government, academia, the media, and the business community. Through its four research centers the Institute publishes books and studies, provides commentary to leading media, hosts public events, and conducts comprehensive grassroots and community outreach.

Amici seek to augment Petitioners' arguments by illustrating that this Court has previously indicated that the phrase "one Nation under God" in the Pledge of Allegiance to the United States flag is a constitutionally acceptable expression that this country's destiny was rooted in the Divine. Amici will also show that when Congress added the phrase "one Nation under God" in an action separate from the original codification

of the Pledge, the Pledge was not converted into an act that establishes religion. Therefore, Amici respectfully request that this Court grant their motion to file a brief amicus curiae.

DATED: June, 2003.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Elk Grove Unified School District's policy, which requires teachers to lead willing students in a voluntary recitation of the Pledge of Allegiance to the United States flag, including the phrase "one Nation under God," violates the Establishment Clause of the First Amendment to the United States Constitution.

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SUMMARY OF ARGUMENT

This case presents a significant question of great importance involving federal constitutional law. Amici urge this Court to grant a writ of certiorari because the Ninth Circuit's decision contravenes this Court's long-standing opinions on patriotism and Establishment Clause jurisprudence. As a result, the Ninth Circuit's decision has thrown the nation and its institutions into turmoil and uncertainty. This Court should act expeditiously to resolve this matter definitively, restoring certainty regarding the nation's founding principles.

This Court should also grant certiorari because the decision below will have a negative impact on how public schools lead students in patriotic exercises consisting of voluntary recitations of the Pledge of Allegiance to the United States flag. The Pledge of Allegiance serves the purpose of unifying and celebrating the national identity in one verse that millions of students across this country memorize, recite, and retain throughout their lives. This case is, thus, worthy of this Court's review.

Finally, this Court should grant a writ of certiorari because the Ninth Circuit's opinion conflicts with an opinion of the Seventh Circuit and contradicts this Court's affirmations concerning government expressions of this country's religious heritage.

ARGUMENT

On Flag Day of 1954, Congress amended the Pledge of Allegiance to the United States flag to include the phrase "one Nation under God." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. The Pledge of Allegiance to the United States flag reads presently:

> I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands,

one Nation under God, indivisible, with liberty and justice for all.

4 U.S.C. § 4 (2003).

In amending the Pledge of Allegiance, Congress noted that through recitation of the Pledge in schools, "the children of our land . . . will be daily impressed with a true understanding of our way of life and its origins." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954). Consistent with Congress's goal, California adopted a law requiring its public schools to begin each day with "appropriate patriotic exercises," stating that "[t]he giving of the Pledge of Allegiance to the United States flag shall satisfy this requirement." *See* Cal. Educ. Code § 52720 (West 1989). The Elk Grove Unified School District complies with the state provision by directing its schools to recite the Pledge of Allegiance to the United States flag daily. *Newdow v. United States Congress*, 292 F.3d 597, 600 (9th Cir. 2002) (*Newdow*). Complying with this Court's First Amendment jurisprudence in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), student participation in reciting the Pledge is strictly voluntary, not compulsory.

I

THE OUTCRY CAUSED BY THE DECISION ILLUSTRATES THE SPLIT BETWEEN THE JUDICIARY AND THE EXECUTIVE AND LEGISLATIVE BRANCHES CONCERNING THE ESTABLISHMENT CLAUSE

Although political reaction is in no way a gauge of the constitutionality of any given activity or issue, it can be relevant for purposes of granting certiorari. The danger that attaches to highly publicized cases in which circuit conflict exists is that postponement of resolution can foster diminished respect for federal law in the citizenry. Few cases illustrate this potential better than this one.

The Ninth Circuit's decision set off a firestorm of debate throughout the nation, which was reeling under a post-September 11 reality, and manifested itself in several acts of government. Congress rarely emerges from bipartisanship to speak unanimously on any issue. Nonetheless, within hours after the Ninth Circuit's decision, House of Representative members gathered on the steps of the Capitol to recite the Pledge of Allegiance to the United States flag, complete with the phrase "under God," as a sign of solidarity and dissatisfaction with the decision. *See* Evelyn Nieves, *Judges Ban Pledge of Allegiance from Schools, Citing Under God*, N.Y. Times, June 26, 2002, at A1, A13. Likewise, the United States Senate voted 99 to 0 to voice its strong opposition to the Ninth Circuit's ruling and to authorize Senate counsel to intervene in the case. *See* Carl Hulse, *Lawmakers Vow to Fight Judges' Ruling on the Pledge*, N.Y. Times, June 27, 2002, at A20. The President also went on the record showing his consternation for the decision, stating: "The declaration of God in the Pledge of Allegiance doesn't violate rights. As a matter of fact, it's a confirmation of the fact that we received our rights from God, as proclaimed in our Declaration of Independence." *See Bush Calls Pledge Ruling Out of Step*, USA Today, June 27, 2002, www.usatoday.com/news/nation/2002/06/27/bush-pledge.htm. Thus, almost immediately, both the executive and legislative branches of government weighed in with disdain for the decision.

These affirmations by the Executive and Legislative branches of the Pledge are consistent with the historical record that the modification to the Pledge did not offend the Establishment Clause. In amending the Pledge, the House Report noted the nation's Founders did not intend to prohibit government expressions that recognized the importance of this country's religious heritage. H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2. The Report goes on to explain that Congress

believed it was acting consistently under controlling precedent from this Court:

> The Supreme Court has clearly indicated that references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment.

H.R. Rep. No. 1693, *supra*, at 3. It also notes that the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." *Id.* Thus, Congress relied on this Court's jurisprudence to modify the Pledge of Allegiance to the United States flag.

Now, however, the Ninth Circuit's decision has contravened long-standing opinions of this Court on patriotism and Establishment Clause jurisprudence. As explained fully in the Petitions for Writ of Certiorari, the Ninth Circuit's reasoning is inaccurate and ignores the carefully formulated constraints that this Court has applied to its decisions. This Court has indicated repeatedly that the Pledge's text, as amended, does not violate the Establishment Clause. As Judge Fernandez pointed out, the majority opinion of the Ninth Circuit "fail[ed] to look at the good sense and principles that animated those tests in the first place." 292 F.3d at 615 (Fernandez, J., concurring and dissenting). One comment about this decision said:

> Like my youngest child, the Ninth Circuit judges responsible for the Pledge decision seem to know the color of the crayon, but not how to stay within the lines.

Chris D. Albright, *The Words "Under God" Do Not Render the Pledge of Allegiance Unconstitutional*, 11 Nev. Law. 9, 13 (2003).

The Ninth Circuit decision has thrown this nation and its institutions into turmoil and uncertainty by finding a 49-year-

old practice unconstitutional. This Court should act expeditiously to resolve this matter definitively, restoring certainty regarding the nation's founding principles. The idea that "all men are created equal" and are "endowed by their Creator with certain inalienable rights" is fundamental to our government and individual liberty and worthy of this Court's definitive review.

II

POSTPONING DEFINITIVE RESOLUTION OF THIS IMPORTANT ISSUE WILL PRESERVE CIRCUIT CONFLICT, FOSTER UNCERTAINTY AMONG AMERICANS, AND DISCOURAGE SCHOOL DISTRICTS WITH PATRIOTIC POLICIES

This Court's review is warranted because the Ninth Circuit's holding expressly conflicts with the Seventh Circuit's decision in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993), which rejected a similar Establishment Clause challenge to the Pledge.

Unlike the Ninth Circuit here, in *Sherman*, the Seventh Circuit held that public elementary "schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate." *Sherman*, 980 F.2d at 439. Conversely, the Ninth Circuit's opinion held that voluntary recitation of the Pledge in public school classrooms violates the Establishment Clause. Thus, granting certiorari to resolve this important question will restore certainty and consistency not only in our nation's schools, but also in the circuit courts.

Presently, schools in the Seventh Circuit enjoy the assurance that they act consistent with law when they adopt school district policies allowing voluntary recitation of the Pledge of Allegiance to the United States flag in their classrooms. In contrast, the millions of public school students throughout the Ninth Circuit, the largest geographical area of

any circuit in the nation,[2] are either unable to engage in this time-honored ritual, or must use an abridged Pledge, mandated by judicial decree. Ironically, the Ninth Circuit's opinion has caused the Pledge of Allegiance to the United States flag, a symbol of our "indivisible" nation, to become a fountain of division through judicial decree.

School districts outside the Seventh Circuit, which looked to *Sherman* for guidance in adopting their patriotism policies, now require additional assurance that their policies comply with applicable law. In the wake of the Ninth Circuit's opinion, and the absence of controlling precedent from this Court, school districts are left to question the continued validity of their patriotism policies. Uniformity of federal law would provide the requisite assurances to school districts of the legality of their chosen policies and would avoid making our public schools easy targets for further wasteful litigation of this issue that school districts can ill afford.

The Pledge of Allegiance to the United States flag describes the character of the Republic which is a unified country, composed of individual states, yet an indivisible nation, which was formed to promote liberty and justice for all. The Pledge serves the purpose of unifying and celebrating the national identity in one verse that millions of students across this country memorize, recite, and retain throughout their lives. The Pledge cannot serve its purpose of unifying and celebrating the national identity unless it is one Pledge, with one content, for all citizens. Because the decision below causes disharmony in this nation's public schools, this Court should grant certiorari.

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[2] The geographical area of the Ninth Circuit accommodates approximately 9.6 million students. *Newdow II*, United States' Appendix to Petition for Writ of Certiorari (U.S. Pet. App.) at 69a (O'Scannlain, J., dissenting).

III

THIS COURT HAS ENDORSED GOVERNMENT PATRIOTIC EXPRESSIONS CONCERNING THIS NATION'S RELIGIOUS HERITAGE, ENDORSEMENTS THE NINTH CIRCUIT CONTRAVENES BY HOLDING UNCONSTITUTIONAL THE PLEDGE OF ALLEGIANCE TO THE UNITED STATES FLAG

Although this Court has not addressed directly the constitutionality of the Pledge, it has addressed the issue in cases inextricably linked to the present matter. For example, this Court has stated unequivocally that the Pledge of Allegiance to the United States flag does not violate the Establishment Clause because the phrase "one Nation under God" is a constitutionally acceptable expression of our heritage which "solemniz[es] public occasions, express[es] confidence in the future, and encourag[es] the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984). Thus, this Court reasons that the language "one Nation under God" as part of the Pledge of Allegiance to the United States flag is another example of our religious heritage. *Lynch v. Donnelly*, 465 U.S. at 676.

This Court's jurisprudence presents unmistakable expressions of this Court's opinion concerning the constitutionality of voluntary recitation of the Pledge of Allegiance to the United States flag. However, the Ninth Circuit dismissed the consistent authority as "dicta." 292 F.3d at 611 fn. 12. The Ninth Circuit erred by dismissing this Court's jurisprudence so lightly because, as stated by this Court, "the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 602-03 (1989). The Ninth Circuit should not have analyzed this Court's opinions in

isolation, but studied the reasoning the Court employed in arriving at its decisions.

Had the Ninth Circuit done so perhaps it would not have erred by failing to recognize that the Court's language in these cases illustrates the map it follows in deciding Establishment Clause issues. That map contains the starting point "in the oft-repeated understanding" that the Pledge, and other similar references, are constitutional. *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). Thus, this Court has used the Pledge as a benchmark for what the Establishment Clause permits. *See County of Allegheny*, 492 U.S. at 602-03.

In addition, this Court has addressed the broader issue of the permissibility of historical references to our nation's founding. First, this Court cited with approval the fact that "school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity." *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). One year later, this Court explained our national life reflects a religious people in noting numerous permissible public references to God in historical documents and ceremonial practices, such as oaths ending with "So help me God" and "in God we trust." *School District of Abington Township v. Schempp*, 374 U.S. 203, 213, 304 (1963). Finally, 20 years later this Court cited another example of such constitutionally acceptable expression, which is announced in this Court: "God save the United States and this Honorable Court." *See Marsh v. Chambers*, 463 U.S. 783, 785 (1983).

This Court's opinions throughout the decades recognize that the Founders believed our rights as free and equal people flow from a higher being, not from the whim of a monarchy or from the sufferance of a current political majority. Accordingly, this Court acknowledged properly that the Founding Fathers did not intend to prohibit government

expressions that recognize this country's religious heritage. *See Lynch*, 465 U.S. at 675. Rather, our history is replete with the Founders' official references to a Supreme Being. *Id.*

Consequently, the challenged phrase, "one Nation under God," merely describes our nation's heritage: We do not "pledge allegiance to God," we "pledge allegiance to the flag" and to our nation which is described as having been founded as "one Nation under God" as a result of our religious heritage. In contrast, the Ninth Circuit erred in holding the phrase "one Nation under God" serves a religious purpose and is thus an unconstitutional religious expression. In this manner, the Ninth Circuit used a contradictory analysis rather than the analysis employed by this Court, which "refuse[s] 'to construe the Religion Clauses with the literalness that would undermine the ultimate constitutional objective *as illuminated by history.*'" *Lynch*, 465 U.S. at 678 (citations omitted); (emphasis added).

The Ninth Circuit's opinion invokes what this Court describes as a "rigid, absolutist view of the Establishment Clause" that this Court has rejected. *See Lynch*, 465 U.S. at 678. If allowed to stand, the Ninth Circuit's reasoning would essentially mandate the teaching of revisionist history in our classrooms. It could form the basis for eliminating from the public school curriculum the very documents upon which this country was founded because they contain references to this country's religious heritage. For example, the Declaration of Independence, our most cherished symbol of liberty, states:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and *of Nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

> We hold these truths to be self-evidence, that all men are created equal, that they are endowed *by their Creator* with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.
>
> . . .
>
> And for the support of this Declaration, with a firm reliance on the protection *of Divine Providence*, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

The Declaration of Independence (U.S. 1776) (emphasis added).

Under the reasoning of the Ninth Circuit, the teaching of this document is in jeopardy. The education of public school children today should include the ideals that this county was founded upon so that the government established over 200 years ago will remain relevant, vital, and strong.

As mentioned above, a fair reading of this Court's jurisprudence illuminates the relative import that the Pledge of Allegiance to the United States flag has within this Court's overall Establishment Clause analysis. Despite no direct challenge in this Court to the constitutionality of the Pledge of Allegiance to the United States flag, this Court has nonetheless addressed the issue in dicta. This indicates the importance of the federal question embodied in the Petition and provides further reason why this Court should grant certiorari.

CONCLUSION

In order to reaffirm the ability of our public schools to refer accurately to our nation's history and restore the historical

intent of the Establishment Clause consistent with this Court's pronouncements, this Court should grant the Petition for Writ of Certiorari.

DATED: June, 2003.

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